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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 451

THE PENNSYLVANIA RAILROAD COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

This case presents questions relating to the reviewability of determinations of the Interstate Commerce Commission which are made "in aid of litigation" on referral by a court. The principal question is whether such determinations are judicially reviewable "orders" of the Commission within the meaning of 28 U.S.C. 1336.[1] The Court of Claims has held, in effect, that they are not. On the basis of the administrative resolution of the issues raised in peti-

[1] 28 U.S.C. 1336 derives from the Urgent Deficiencies Appropriations Act of 1913, 38 Stat. 219. The Act now is codified at 28 U.S.C. 1253, 1336, 2101, 2284, 2321-2325.

tioner's Tucker Act suit and referred to the Commission under the primary jurisdiction doctrine, the court entered a judgment denying in large part the relief sought by petitioner. In doing so, the court declined to stay further the judicial proceedings to enable petitioner to obtain review of the Commission determination in the United States District Court for the Eastern District of Pennsylvania.[2] We do not oppose the granting of the petition for a writ of certiorari.

1. In urging that the determination made by the Commission was within the ambit of 28 U.S.C. 1336, and therefore subject to an independent proceeding in a district court to enjoin, set aside and annul it, petitioner places principal reliance (Pet. pp. 6-8) upon *El Dorado Oil Works* v. *United States*, 328 U.S. 12. That decision does lend considerable support to petitioner's position. At the same time, however, it did not purport to overrule several earlier decisions of the Court holding that not all determinations of the Commission are "orders" reviewable under the Urgent Deficiencies Appropriations Act. See, *e.g.*, *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U.S. 299; *United States* v. *Griffin*, 303 U.S. 226; *Great Northern Ry. Co.* v. *United States*, 277 U.S. 172; *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U.S. 522; *Shannahan* v. *United States*, 303

[2] Petitioner commenced the proceedings in the Eastern District of Pennsylvania in accordance with 28 U.S.C. 1398, which provides that an action to enforce, suspend or set aside an order of the Interstate Commerce Commission shall be brought in the district of "the residence or principal office of any of the parties bringing such action".

U.S. 596.[3] In concluding that there was no jurisdiction in a district court to review the particular administrative determinations involved in these latter cases, the Court stressed considerations which seem to apply to the Commission decision which this petitioner seeks to challenge.

In *Los Angeles & Salt Lake R. Co., supra*, for example, the Commission had made a valuation determination respecting the property of the carrier. This determination was held not to be reviewable under the Urgent Deficiencies Appropriations Act because (273 U.S. at 309-310):

> [It] is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority,

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[3] In *United States* v. *Griffin, supra*, the Court noted (303 U.S. at 233):

> In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act.

> privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. * * * It was merely preparation for possible action in some proceeding which may be instituted in the future * * *.

In the *Shannahan* case, *supra*, the National Mediation Board referred to the Commission the question of whether a specific electric railway was a "carrier" for the purposes of the Railway Labor Act. Rejecting the endeavor of the railway's trustees to obtain review under the Urgent Deficiencies Appropriations Act of the Commission's resolution of the question, the court observed that the administrative decision (1) had neither the form nor the characteristics of an order; and (2) was without effect upon the railway absent action by some other agency or tribunal. 303 U.S. at 599. And in *Great Northern*, *supra*, the Commission issued two certificates to the Secretary of the Treasury, which reflected the amount which the Commission had determined to be due the carrier by reason of the Government control of the railroads during World War I. The ruling by this Court that the district court was without jurisdiction over the carrier's suit to annul the certificates was based upon the fact that, in issuing them, the Commission was performing a temporary and non-recurrent task, and

that its decision contained "no direction, no word of command". 277 U.S. at 180.

The Commission's determination in the present case similarly possesses neither the form nor the characteristics of an order. It contains no "direction" or "word of command". All that the Commission did was to file a report setting forth its findings and conclusions on the question referred to it by the Court of Claims—and then to order that the administrative proceedings be discontinued. Stated otherwise, the Commission's determination could only be executed through further action in the Court of Claims, for whose benefit the report was made.

2. We are advised by the Commission that it does not maintain statistical data regarding the volume of referrals of administrative questions to it by courts. It is clear, however, that this Court's decision in December 1956 in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, has resulted in a substantial increase of such referrals. Since *Western Pacific*, at least seventeen referrals have been made by the Court of Claims alone. Several district courts also have referred administrative questions arising in suits under the Tucker Act. And it is likely that both federal and state courts have similarly invoked the primary jurisdiction doctrine in litigation between private parties.

3. Because of this increased volume of referrals, a number of district courts recently have been confronted with the precise question involved here. Their decisions are in sharp conflict and reflect the confusion and uncertainty prevailing in this area.

Two district courts have held that determinations made by the Commission on referral are reviewable in an independent proceeding brought for that purpose. *Davidson Transfer & Storage Co.* v. *United States*, 164 F. Supp. 571 (D. Md.); *Eastern Freight-Ways, Inc.* v. *United States*, 170 F. Supp. 848 (D. N.J.). In the *Davidson* case, the court expressly rejected the contention (advanced by the Commission itself) that, since the administrative determination was merely ancillary to the litigation in the referring court, it was reviewable solely by the latter.

On the other hand, at least two other district courts have held, in common with the court below, that there is no independent review in the present circumstances. In *Northern Pacific Ry. Co.* v. *United States*, the Court of Appeals for the Eighth Circuit directed the District Court for the District of Minnesota to refer one of the questions in litigation to the Commission. 213 F. 2d 366. Following an adverse decision by the Commission, the United States instituted a proceeding in the District Court for the District of Columbia to set it aside.[4] Both the Commission and the carrier moved to dismiss for lack of jurisdiction. On October 5, 1959, the court granted the motion on the ground that the report of the Commission was no more than an advisory opinion, and that it was open to the Government to urge in the referring court that it should not be followed.

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[4] In order to permit the United States to do so, the Minnesota district court stayed action on the carrier's motion for summary judgment on the basis of the Commission's report.

United States v. *United States, et al.*, Civil Action No. 1057-58 (D. D.C.).

In *United States* v. *Chesapeake and Ohio R. Co.*, following a remand from this Court (352 U.S. 77), the Fourth Circuit directed the District Court for the Eastern District of Virginia to refer to the Commission the question of the applicability of the export rate to the shipments there involved. 242 F. 2d 732. On the basis of a favorable report by the Commission, the carrier immediately moved for the entry of judgment. On August 31, 1959, the motion was granted notwithstanding the contention of the United States—similar to that of the petitioner here—that it was entitled to obtain independent review of the Commission determination.

4. In *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, this Court held that the Commission's determination there under consideration was an "order" with legal consequences, subject to judicial review under 28 U.S.C. (1946 ed.) 41(28), the predecessor of present Section 1336. But the Court further held that review of this reparation order was not for a three-judge court because (1) the order was not one of national or widespread interest requiring expeditious handling through direct appeal; and (2) a three-judge court has no jurisdiction of Commission orders "for the payment of money" (see 28 U.S.C. 2321). In the *Davidson* and *Eastern Freight-Ways, Inc., cases, supra*, the district courts relied upon this decision in concluding that the Commission's order was reviewable by a one-

judge court.[5]

It is to be noted, however, that in *El Dorado Oil Works* v. *United States*, *supra*, this Court summarily disposed of the jurisdictional question by holding that the Commission's determination with respect to the amount of the car allowance which could be paid to the shipper was within the class of orders "held to be reviewable by a district court of three judges." 328 U.S. at 19. Considering the nature of these orders, it is difficult to distinguish them for purposes of using a three-judge or a one-judge court.

CONCLUSION

For these reasons, we agree that review by this Court is warranted. Although there is no conflict of circuits, there is a conflict among the lower courts with respect to the applicability of 28 U.S.C. 1336 to Commission determinations of the character here involved. The precedents in this Court are not at all clear, and the question is of recurring importance. We believe that it should be expeditiously resolved in the interests of the administration of justice. We do not, therefore, oppose the granting of the petition.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

NOVEMBER 1959.

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[5] Petitioner here brought its proceeding before a single-judge district court for the Eastern District of Pennsylvania (Pet. 5, fn. 1).

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